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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MANUFACTURERS HANOVER
LEASING CORPORATION,

Petitioner,

—v.—

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION AND BRIEF OF *AMICUS CURIAE*

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MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The New York Clearing House Association[1] (the "Clearing House") respectfully moves for leave to file the brief annexed hereto as *amicus curiae* in support of the petition for a writ of certiorari of Manufacturers Hanover

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

Leasing Corporation. The issue presented by the petition—whether a lender is exposed to an expanded preference period in a bankruptcy case because an insider has guaranteed the debtor's obligations to the lender—is a matter of significant concern to the Clearing House and its members.

Petitioner has consented to the filing of a brief *amicus curiae* by the Clearing House, but respondent has withheld his consent.

Respectfully submitted,

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE* SUPPORTING THE PETITION

Interest of *Amicus Curiae*

The New York Clearing House Association (the "Clearing House") is an association of 11 leading commercial banks in the City of New York.[1] The Clearing House banks

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

are among the nation's largest consumer and commercial lenders, with more than $346 billion in domestic loans outstanding. The Clearing House banks have a substantial interest in having a clear rule governing the application of the preference provisions of the Bankruptcy Code to payments made on bank loans or other commercial credit arrangements. The petitioner is a subsidiary of a Clearing House member.

The issue presented in this case is whether the Bankruptcy Code provides for expanded preference liability for a non-insider creditor because the debtor's obligations to the creditor have been guaranteed by an insider of the debtor. Ordinarily a payment to a creditor is subject to avoidance under section 547 of the Bankruptcy Code only if the payment was made within 90 days of the filing of the petition, but this period is expanded to a year if the creditor is an insider. The decision below concludes that the full year preference period is applicable to a non-insider creditor who holds a guarantee from an insider.

The issue of statutory interpretation presented in this case has received considerable and conflicting attention from the lower courts and from the commentators. The intensity of this scrutiny has not produced a convergence of views. Only a decision of this Court can resolve the conflicting interpretations of the Bankruptcy Code's preference rules.

The rule followed by the court below, and the state of continuing uncertainty as to whether a particular court not subject to binding precedent will follow it, has disrupted the marketplace for commercial credit, particularly for smaller business borrowers. Lenders have traditionally viewed an insider guarantee as an important means of reducing the risk of loss from a commercial loan, because such a guarantee provides the insider with an incentive to continue to operate the debtor's business and to wind up its affairs in an orderly manner if the business is to be closed. Under the rule followed below, however, a lender must either forgo these

benefits by not obtaining a guarantee, expose itself to expanded preference liability if the guarantee is obtained, or negotiate a waiver of the insider's reimbursement rights. By placing the lender in this position, the rule adopted below restricts the availability of credit to borrowers from which a lender would otherwise seek a guarantee and affects the economic assumptions upon which the transaction otherwise would be structured.

The availability of credit for business, and particularly for small businesses and new enterprises, is a matter of clear importance for the nation's economy. A decision clarifying the effect of an insider guarantee upon the rights of a non-insider creditor would strongly enhance the ability of the Clearing House banks and of other lenders to make informed credit decisions.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve sharply contested issues of statutory interpretation and to remove uncertainty in a vital area of credit for the nation's businesses.

I.

The Question Presented Has Divided the Lower Courts.

This petition presents this Court's first opportunity to review the holding of *Levit* v. *Ingersoll Rand Financial Corp.* (*In re V.N. DePrizio Construction Co.*), 874 F.2d 1186 (7th

Cir. 1989) ("*DePrizio*").[2] Although no court of appeals has expressly rejected the *DePrizio* rule, numerous lower courts have done so.[3]

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[2] In addition to the Tenth Circuit in this case, the Sixth and Ninth Circuits have also followed *DePrizio*. *Ray* v. *City Bank & Trust Co.* (*In re C-L Cartage Co.*), 899 F.2d 1490 (6th Cir. 1990); *Official Unsecured Creditors Committee of Suffola, Inc.* v. *U.S. National Bank of Oregon* (*In re Suffola, Inc.*), 2 F.3d 977 (9th Cir. 1993). Decisions from the First and Fourth Circuit decline to decide whether to follow *DePrizio*. *Travelers Ins. Co.* v. *Cambridge Meridian Group, Inc.* (*In re Erin Food Servs., Inc.*), 980 F.2d 792, 797 n. 9 (1st Cir. 1992) (noting that "the *DePrizio* rule represents a radical departure from pre-Bankruptcy Code practice" and the absence of any legislative history evidencing an intent to change the law); *Harmon* v. *First Am. Bank of Maryland* (*In re Jeffrey Bigalow Design Group, Inc.*), 956 F.2d 479, 483 n.2 (4th Cir. 1992) (declining to comment on the "viability" of "very controversial" theory). A decision by the Fifth Circuit does not discuss the correctness of the *DePrizio* rule, but finds the rule inapplicable upon the facts before the court. *Southmark Corp.* v. *Southmark Personal Storage, Inc.* (*In re Southmark Corp.*), 993 F.2d 117, 120 (5th Cir. 1993).

[3] *Weiskopf* v. *New York Job Development Authority* (*In re J.T.L. Supermarket Corp.*), 145 Bankr. 3, 4 (Bankr. N.D.N.Y. 1991) (*DePrizio* discourages loans to small businesses, new businesses and businesses of the entrepreneurial type); *Grove Peacock Plaza, Ltd.* v. *Resolution Trust Corp.* (*In re Grove Peacock Plaza, Ltd.*) 142 Bankr. 506 (Bankr. S.D. Fla. 1992); *Performance Communications, Inc.* v. *First National Bank* (*In re Performance Communications, Inc.*), 126 Bankr. 473 (Bankr. W.D. Pa. 1991); *Official Creditors' Committee of Arundel Housing Components, Inc.* v. *Georgia Pacific Corp.* (*In re Arundel Housing Components, Inc.*) 126 Bankr. 216, 219 (Bankr. D. Md. 1991) (following *DePrizio* would "subvert justice" and "produce much needless mischief"); *Rubin Bros. Footwear, Inc.* v. *Chemical Bank* (*In re Rubin Bros. Footwear, Inc.*), 119 Bankr. 416, 425 (S.D.N.Y. 1990) (*DePrizio* rule "would likely impede the availability of credit to ailing businesses"); *Block* v. *Texas Commerce Bank N.A.* (*In re Midwestern Cos.*), 102 Bankr. 169 (W.D. Mo. 1989); *In re Aerco Metals, Inc.*, 60 Bankr. 77 (Bankr. N.D. Tex. 1985);

(continued...)

The conflict between courts that accept *DePrizio* and courts that reject it arises over whether each of the elements of a preference must be present with respect to the creditor from whom the trustee seeks recovery. *DePrizio* and its progeny conclude that no such requirement exists. Other courts have concluded that the *DePrizio* rule ignores material language of section 550, the section that establishes liability for an avoided transfer, which provides for recovery only "to the extent that" a transfer is avoided under section 547 (the preference provision).

The *DePrizio* rule relies on an approach to the relevant provisions of the Code that appears simple only because it disregards features of statutory language and structure that are inconsistent with the *DePrizio* result:

1. Section 547(b)(4) carefully distinguishes insiders from creditors generally and provides for extended preference liability for insiders. This structure mandates that the outside lender cannot be liable for payments made more than 90 days before the bankruptcy filing.[4] In order to construe section 550, which provides for recovery of avoided transfers, in harmony with section 547, section 547's distinct treatment of transfers to outside creditors must be maintained in interpreting the trustee's recovery powers under section 550, by providing that only an insider may be liable as a transferee of an avoided transfer if the transfer occurred more than 90 days before the filing. *DePrizio* interprets section 550 in a manner that defeats the distinction between insiders and

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[3](...continued)
Goldberger v. *Davis Jay Corrugated Box Corp.* (*In re Mercon Industries, Inc.*), 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

[4] *Block v. Texas Commerce Bank Nat'l Ass'n* (*In re Midwestern Cos.*) 102 Bankr. 169 (W.D. Mo. 1989); *In re Grove Peacock Plaza, Ltd.*, 142 Bankr. 506 (Bankr. S.D. Fla. 1992).

non-insiders under section 547, and thus fails to give effect to section 550's "to the extent that" language.[5]

2. Where the language of the Bankruptcy Code is ambigious, courts are not to assume that the Code was intended to change the result that obtained under the Bankruptcy Act absent legislative history that reflects an intent to change the law.[6] *DePrizio* effected such a change, while conceding the silence of the legislative history.[7]

3. The entire *DePrizio* analysis is based on the premise that a payment to the non-insider creditor is "for the benefit" of an insider who has given a guarantee. In ordinary speech, to say that an act is "for the benefit" of another is to imply an intention to confer a benefit. In applying the *DePrizio* rule, however, courts have not sought to determine whether such an intention is present in fact; they have confined their attention to determining whether the transfer left the insider better off in some objective sense, and have accepted highly attenuated grounds for concluding that he or she is. This case, in which the court found that a transfer was "for the benefit" of an insider whose aggregate liabilities were nominally reduced by the transfer but who nonetheless remained hopelessly insolvent after the transfer, is illustrative.

4. Many courts have concluded that a payment to a non-insider creditor and the resulting reduction in the liability of the insider guarantor should be analyzed as distinct transfers. Under that analysis the transfer to the insider may

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[5] *In re Performance Communications, Inc.*, 126 Bankr. 473 (Bankr. W.D. Pa. 1991); *In re Aerco Metals, Inc.*, 60 Bankr. 77 (Bankr. W.D. Tex. 1985); *In re Mercon Industries, Inc.*, 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

[6] *Dewsnup* v. *Timm*, 112 S. Ct. 773, 779 (1992).

[7] 874 F.2d at 1196.

be avoided for up to a year, but the transfer to the non-insider is not subject to avoidance if it is made more than 90 days before the bankruptcy. The Bankruptcy Code defines "transfer" broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property." 11 U.S.C. § 101(54). This language supports the "two transfer" theory.[8]

5. Even some courts that find persuasive the statutory interpretation in *DePrizio* have concluded that the court's equitable powers should be used to prevent the result which *DePrizio* mandates.[9]

II.

Uncertainty Caused by the Conflict Among Lower Courts Is Disrupting the Marketplace for Commercial Credit.

The risk that the *DePrizio* rule will be applied places commercial lenders in the untenable position of having to decide whether the potential benefits of an insider guarantee outweigh the additional preference risk to which the lender is or might be subjected. Faced with such uncertainty, the lender will likely decide to extend credit only for a higher price, or not to extend credit at all. As a result, small and entrepreneurial businesses in particular face increased difficulties in getting the credit they need. These loans are

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[8] *Goldberger* v. *Davis Jay Corrugated Box Corp.* (*In re Mercon Industries, Inc.*), 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

[9] *Schmitt* v. *Equibank* (*In re R. A. Beck Builder, Inc.*), 34 Bankr. 888 (Bankr. W.D. Pa. 1983); *Performance Communications, Inc.* v. *First Nat'l Bank* (*In re Performance Communications, Inc.*), 126 Bankr. 473, 477 (Bankr. W.D. Pa. 1991).

often made with credit enhancement from the Small Business Administration, thereby involving governmental entities in the *DePrizio* dilemma.

A lender concerned with the *DePrizio* rule or its possible application also faces difficult decisions concerning whether to attempt to negotiate terms that may ameliorate its application. Many have suggested that a lender should seek the insider's waiver of the right of reimbursement against the debtor, thus avoiding the *DePrizio* finding that the guarantor is a "creditor" of the debtor, but such waivers are difficult to negotiate. Some argue that such a waiver leaves the lender worse off, and in any event it is unclear how the courts will treat such a waiver. And all would agree that the uncertainty created by *DePrizio* gives such a guarantee less value, both to the lender and to the borrower who would offer it. Another possibility is to accept a guarantee from the insider that is limited to a dollar amount less than that of the debtor's obligations to the lender, or under which the lender's recourse against the guarantor is limited to specified collateral. These artificial measures also limit the effectiveness of the guarantee, and in any event the decided cases do not provide the lender with a high degree of confidence that these measures will be upheld.

DePrizio can cause mischief even when the "insider"-guarantor is not in a position to cause the debtor to make payments, as in the case of an operating company that guarantees the debts of its corporate parent.[10] *DePrizio* can even cause problems for a creditor that does not hold a guarantee. A secured creditor with no insider guarantee could be subjected to the expanded preference period because a junior lienholder holds an insider guarantee. The possibility of such an anomalous result gives secured creditors an

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[10] The subsidiary is an "affiliate" under 11 U.S.C. § 101(2) and is thus deemed an "insider" under 11 U.S.C. § 101(31).

incentive to seek to prohibit debtors from granting junior liens, thus further restricting their borrowing power.

The *DePrizio* issue is not confined to the context of corporate borrowers. A lender to a general partnership could be subjected to the *DePrizio* rule based on the liability of each general partner (who is defined as an "insider" under the Bankruptcy Code) for the debts of the partnership.

This uncertainty also has a negative effect upon the administration of justice in bankruptcy proceedings. As long as there is no controlling precedent concerning the *DePrizio* rule, expensive and time-consuming litigation is necessary to determine what rule will apply. This uncertainty can be resolved by a decision from this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to the Tenth Circuit should be granted.

Respectfully submitted,

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